UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 98-0057 (PLF)
MARIA HSIA,	)	
Defendant.	)	

OPINION AND ORDER

By order of December 18, 2000, the Court referred defendant Maria Hsia's motion for a Kastigar hearing to Magistrate Judge John Facciola pursuant to 28 U.S.C. § 636(b) and Rule 57.19(a)(1) of the Local Criminal Rules of this Court. Magistrate Judge Facciola was directed to conduct a Kastigar hearing and to submit findings of fact and recommendations to this Court. The magistrate judge conducted the hearing over two days, on January 10 and 11, 2001. He heard the testimony of Campaign Financing Task Force attorneys John M. McEnany and Eric L. Yaffe, the prosecutors responsible for this case; Robert Conrad, the Chief of the Campaign Financing Task Force; and Daniel O'Brien, the Assistant United States Attorney in Los Angeles, California responsible for a related investigation in which Ms. Hsia was subpoenaed to testify before a grand jury. The proceedings before Magistrate Judge Facciola were tape-recorded, transcribed, and now have been reviewed by this Court.

On January 15, 2001, Magistrate Judge Facciola issued his Report and Recommendation setting forth his 32 findings of fact, his analysis under Kastigar v. United States, 406

U.S. 441 (1972), his conclusion that there was a Kastigar violation and his recommendation that, as a remedy, the government be precluded from making one particular sentencing argument, an argument for an upward departure under Application Note 11 to Section 2F1.1 of the Sentencing Guidelines, that he found was based on a non-evidentiary use of Ms. Hsia's immunized grand jury testimony.

The government and the defendant each filed objections to Magistrate Judge Facciola's Report and Recommendation. The government argued both that the procedures it followed were fully sufficient to satisfy Kastigar and that, in any event, legal reasoning and argument can never be suppressed under Kastigar. Defendant argued that Magistrate Judge Facciola did not go far enough, maintaining that all sentencing arguments propounded by the government and all prosecutors involved in this case have been tainted by the Kastigar violation. The Court heard argument on the parties' objections on January 22, 2001. Because it appeared at the hearing that the disputes about the facts found by the magistrate judge had been narrowed, the Court asked the parties to submit revised and supplemental objections which they now have done.

I. FINDINGS OF FACT

The Federal Magistrates Act of 1968, 28 U.S.C. §§ 631 *et seq.*, permits a district court judge to designate a magistrate judge to conduct an evidentiary hearing in certain criminal matters and to submit proposed findings of fact and recommendations. See 28 U.S.C. § 636(b)(1)(B). Upon consideration of the magistrate judge's findings and recommendations and after considering objections filed by the parties, the district court judge "shall make a

de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . [and] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). Our Local Criminal Rules have a parallel provision providing that the district court judge shall make "a *de novo* determination of those portions of a magistrate judge's findings and recommendations to which objection is made . . . ." LCrR 57.19(c). Applying these standards, the Court will accept all of Magistrate Judge Facciola's findings of fact as to which there is no objection and will review *de novo* only those findings as to which either side has objected.

The government did not object to any of the magistrate judge's findings of fact. Following the hearing before this Court on January 22, 2001, Ms. Hsia in her supplemental filing reiterated that she did not object to Findings 1-4, 6-7, 9, 13-15, 18-21, 23 and 30-32. In addition, she withdrew her earlier requests for clarification as to Findings 5, 8, 10, 12, 22, 24, 25 and 26. This Court therefore accepts and adopts those Findings made by Magistrate Judge Facciola in their entirety. It turns now to the contested findings.

Finding 11: Ms. Hsia requests that Finding 11 be modified to indicate that Mr. Conrad supervised both the investigation in this case and Mr. O'Brien's investigation in Los Angeles. The portion of the transcript cited by Ms. Hsia supports such a finding of fact. The Court concludes that there is no need to modify Finding 11, however, because as the government points out, Finding 2 indicates that Mr. Conrad supervised the investigation and trial in this case, and Finding 4 indicates that Mr. Conrad was also in charge of supervising the California Task Force investigation and that he supervised both the investigation of Ms. Hsia and the campaign financing investigation in a "hands on" fashion.

Finding 16: Ms. Hsia requests that Finding 16 be amended to include the following: "Mr. Conrad testified that he did not recall Mr. McEnany asking for help with Ms. Hsia's Sentencing before he contacted Mr. Yaffe to appear as a special attorney on behalf of the Department of Justice for this case. Mr. McEnany also stated that he was not advised that Mr. Conrad was considering bringing Mr. Yaffe back to assist with this case until after Mr. Conrad spoke with Mr. Yaffe about returning." Because the government acknowledges that these statements are substantially accurate, the Court will modify Finding 16 to include these facts.

Finding 17: Ms. Hsia requests that Finding 17 be amended to indicate that Mr. Conrad testified that he believed it to be a fair proposition to state that similarly situated defendants shall be treated the same by the Department of Justice. Upon review of the transcript, the Court agrees with the government that the requested finding is a misleading or at least incomplete characterization of the testimony concerning the Task Force's position on sentencing in different cases. While at one point Mr. Conrad did agree "[a]s a general proposition" with defense counsel's assertion that similarly situated defendants should be treated similarly, Transcript of January 11, 2001, Hearing ("1/11/01 Tr.") at 90, his overall testimony was much more nuanced than defendant suggests and does not in context support her proposed factual finding. See id. at 82-104. The Court therefore rejects this request as not supported by the evidence and will not modify the magistrate judge's Finding 17.

Finding 27: The defendant requests that Finding 27 be modified to indicate that (1) the first meeting with Probation was in May 2000, and (2) at this meeting they discussed the matching funds issue and the "kingpin" adjustment in addition to Application Note 11. The Court will modify Finding 27 to indicate that the first meeting with Probation took place in May 2000. With respect to Ms.

Hsia's second request, the Court will modify Finding 27 by adding the following sentence at the end of Finding 27: "The matching funds issue and the so-called 'kingpin' adjustment issue also were discussed at the May 2000 meeting with Probation."

Findings 28 and 29: Ms. Hsia requests that Findings 28 and 29 be modified to indicate that Mr. McEnany and Mr. Conrad discussed not only the proper measure of loss under Application Note 11, as found by Magistrate Judge Facciola, but also that Mr. Conrad discussed everything that was contained in the government's Sentencing Memorandum with Mr. McEnany and/or Mr. Yaffe. She maintains that Mr. Conrad testified that he suggested some of the language to be used in the government's Sentencing Memorandum without limiting his suggestions to Application Note 11 issues. The government resists these requests for modification, maintaining that Magistrate Judge Facciola's characterization of the testimony is more accurate.

The Court has now reviewed the relevant portions of the transcript and finds that Mr. McEnany would have taken the very same positions ultimately taken in sentencing except for the Application Note 11 argument if he had never spoken to Mr. Conrad. Transcript of January 10, 2001, Hearing at 106-08. Furthermore, while Mr. Conrad did discuss "everything that was contained in [the] sentencing memorandum" with Mr. McEnany and Mr. Yaffe, he testified without contradiction that the "most substantive discussions" he had with them related to Application Note 11 and that he expressed the opinion that "the most appropriate measure of loss was an analogy to the fraud tables in a dollar to dollar fashion." 1/11/01 Tr. at 25-27. Furthermore, Mr. Conrad reviewed the government's Sentencing Memorandum but did not write it, edit it or add to it. Id. at 30. Findings 28 and 29 are amended by adding these additional findings to those facts found by the magistrate judge.

Proposed Finding 33: The defendant proposes an additional finding of fact, proposed Finding 33, which attempts to set forth a revised chronology of events beginning with Ms. Hsia's appearance before the grand jury in Los Angeles and including her various meetings with the Probation Office. The government objects to some portions of Ms Hsia's proposal, arguing that the transcript does not support some of it and that other portions are either incomplete or already dealt with in the Findings of the magistrate judge. The Court will adopt Ms. Hsia's proposal in a modified fashion and finds the following fact which will be added as Finding 33:

> 33. The chronology of relevant events is as follows:
>
> (1) April 4 and April 11, 2000: Ms. Hsia appeared to testify before the grand jury in Los Angeles;
>
> (2) Sometime between April 4 and April 18, 2000: Mr. Conrad spoke with Mr. O'Brien about Ms. Hsia's testimony;
>
> (3) April 18, 2000: Mr. Conrad questioned former Vice-President Gore and, among many other unrelated matters, asked him about Ms. Hsia's ability to speak English;
>
> (4) At some point after Ms. Hsia appeared before the grand jury, Mr. Yaffe spoke with Mr. O'Brien about Ms. Hsia's grand jury testimony, but they did not discuss the content of her testimony;
>
> (5) May, 2000: Mr. McEnany and Mr. Yaffe first met with Probation Officer Theresa Brown;
>
> (6) June 21, 2000: Mr. Conrad testified before the Subcommittee on Administrative Oversight and Courts of the Senate Committee on the

Judiciary. See Memorandum Opinion and Order of December 18, 2000, at 6-8;

(7) September, 2000: Mr. Conrad contacted Mr. Yaffe to ask him to become a special Justice Department attorney to assist in sentencing matters in this case (see Finding 16);

(8) November 8, 2000: Probation Officer Brown received Mr. McEnany's letter outlining the government's Sentencing Guideline recommendations.

Proposed Findings 34-36: With respect to the defendant's proposed Findings 34-36, relating to an analysis of other Campaign Financing Task Force plea agreements,[1] the Court concludes that it is more appropriate for the Court to take judicial notice of the plea agreements and to permit counsel for Ms. Hsia to make whatever legal arguments she wishes to make based upon these plea agreements, either in connection with the Kastigar issue or in connection with sentencing itself, rather than to make findings of fact based on them. In addition, to the extent that the plea agreements are relied upon by the defendant to show vindictiveness on the part of the government, the Court does not believe that vindictiveness is a relevant factor in the Kastigar analysis. See *infra* at 10-11.

The Government's Proposed Additional Evidence: Subsequent to the hearing before Magistrate Judge Facciola, the government submitted the Affirmation of Michael E. Horowitz, Chief of Staff to the Assistant Attorney General for the Criminal Division, Department of Justice. While the defendant objects to the Court's considering this Affirmation, both the Federal Magistrates Act and our

[1] There is a dispute between the defendant and the government as to whether the cases of Nora Lum and Gene Lum should be considered as Task Force cases.

Local Rules permit the district court judge, upon reviewing a report and recommendation of a magistrate judge, to receive further evidence. See 28 U.S.C. § 636(b)(1); Local Criminal Rule 57.19(c). Accordingly, the Court will consider Mr. Horowitz's Affirmation for what it is worth and makes the following additional Finding of Fact based on that Affirmation:

> 34. Sometime in or about November 2000, Michael E. Horowitz, Chief of Staff to the Assistant Attorney General for the Criminal Division, United States Department of Justice, authorized Robert Conrad to pursue an upward departure theory in Maria Hsia's case based upon a dollar for dollar analogy to the fraud tables found in Section 2F1.1 of the United States Sentencing Guidelines. While Mr. Horowitz states that in authorizing Mr. Conrad to take such action Ms. Hsia's grand jury testimony had nothing to do with his views on the matter, there is nothing in the record to indicate whether Mr. Horowitz did or did not know about her grand jury testimony or whether he and Mr. Conrad discussed her testimony or her appearance before the grand jury. Nor is there anything in the record as to who broached the subject of an upward departure in the first place, Mr. Horowitz or Mr. Conrad.

II. ANALYSIS

The Court has reviewed Magistrate Judge Facciola's conclusions of law as set forth in his Report and Recommendation and has carefully considered the objections of the government and the defendant along with the relevant case law. The Court has reviewed the magistrate judge's analysis *de novo* in view of the facts he found, as modified by the additional and modified Findings of Fact set out in Part I of this Opinion. The Court agrees with the analysis and conclusions of Magistrate Judge Facciola substantially for the reasons given by him and therefore will suppress all references, oral and written, to the Application Note 11 sentencing argument and will not consider the government's request for an upward departure on that basis.

As Magistrate Judge Facciola pointed out, no one is suggesting that Ms. Hsia's Fifth Amendment rights were violated by the direct use of her immunized testimony at her grand jury appearance in Los Angeles. Mr. Conrad, Mr. McEnany and Mr. Yaffe have never even read the transcript of her grand jury testimony, nor have any of them discussed the substance of it with Mr. O'Brien.[2] As a result, Ms. Hsia does not claim that the evidence upon which the government relies in connection with sentencing "came from her own mouth." Report and Recommendation at 10. Rather, Ms. Hsia's argument is "more complicated and subtle." Id. She maintains that all of the arguments made by the government in connection with sentencing are "a product of her grand jury appearance in the sense that the government was motivated to make those arguments because of its perception that she was insincerely asserting language difficulties and thereby evading her obligation to testify truthfully under the immunity order." Id. According to her, the novel Application Note 11 argument made by the government in this case — as well as other arguments regarding matching funds, more than minimal planning, and aggravated role in the offense — constitutes non-evidentiary use of her immunized testimony that is prohibited by Kastigar.

The government has three responses to Ms. Hsia's Kastigar argument. First, it asserts that there is no basis in the record for the suggestion that Mr. Conrad was motivated by vindictiveness in discussing with his colleagues a possible departure under Application Note 11 to Section 2F1.1 of the Sentencing Guidelines. Second, the government maintains that it followed adequate procedures and took precautions that were fully sufficient under the immunity statute and Kastigar. Third, the

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[2] In addition, Ms. Hsia produced no documents for the grand jury's examination.

government argues that even if Kastigar has been violated there can never be a justification for suppressing legal analysis, legal reasoning or a legal position or argument. Alternatively, and in response to the defendant's objections to Magistrate Judge Facciola's Report and Recommendation, the defendant argues that even if this Court were to suppress and decline to consider the Application Note 11 argument, there is no reason on the basis of the record developed before the magistrate judge to suppress any other sentencing arguments propounded by the government. The Court will address each of these arguments in turn.

The government's first contention — that the magistrate judge erred because there was no evidence before him that any actions taken by Mr. Conrad were motivated by vindictiveness — is easily disposed of. This Court has decided on at least four prior occasions that Ms. Hsia was not selectively prosecuted and that the government has not acted out of vindictiveness. See United States v. Hsia, 24 F. Supp. 2d 33, 47-52 (D.D.C. 1998) (denying motion to dismiss indictment on grounds of selective prosecution); United States v. Hsia, 24 F. Supp. 2d 63 (D.D.C. 1998) (denying motion to reconsider decision denying motion to dismiss); Order of Jan. 21, 2000 (denying renewed motion to dismiss indictment on grounds of selective prosecution); Memorandum Opinion and Order of Dec. 18, 2000 (denying motion to dismiss indictment or disqualify Department of Justice on grounds of prosecutorial misconduct and conflict of interest). But the motivation or vindictiveness of the prosecutor is not the issue under Kastigar. What matters is whether the compelled testimony is used "in any respect," Kastigar v. United States, 406 U.S. at 453, not the good or bad faith of the prosecutor who uses it.

If one thing is absolutely clear from the Supreme Court's decision in Kastigar, it is that a prosecutor's motive for using immunized testimony is irrelevant:

> The total prohibition on use provides a comprehensive safeguard, ... A person accorded this [use] immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities.

Kastigar v. United States, 406 U.S. at 460. Indeed, at least one court has held that the federal use immunity statute is violated even when a prosecutor operating in the best of faith reviews immunized testimony by mistake, without knowing that it was compelled, see United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973), and our court of appeals has endorsed that view: "The prosecutor's knowledge (or lack thereof) that the testimony was immunized is relevant to the question of prosecutorial good faith, not prosecutorial use. The Fifth Amendment . . .

can be violated whether or not the prosecutor has knowledge that the testimony is immunized . . . ." United States v. North, 910 F.2d 843, 859 (D.C. Cir. 1990). Kastigar prohibits any use of immunized testimony; a prosecutor's motivation in using it is beside the point. See id. at 861.

The government's second argument — that the procedures it took were fully sufficient to satisfy Kastigar — must be rejected based on the D.C. Circuit's interpretation of Kastigar in United States v. North, 910 F.2d 843 (D.C. Cir. 1990). While the court in North did not go so far as to state that the careful precautions taken by the Independent Counsel in that case were insufficient on their face to satisfy Kastigar, the barriers it established for a hearing on remand made it virtually impossible for the Independent Counsel to meet his "heavy burden" under Kastigar to prove that "all of the evidence [he] propose[d] to use was derived from legitimate independent sources." United States v. North, 910

F.2d at 854 (quoting Kastigar v. United States, 406 U.S. at 460). Under North, unless every "i" is dotted and every "t" is crossed, the government has an almost insurmountable burden to demonstrate that the use of immunized testimony, no matter how indirect, has not been tainted by knowledge of the grand jury testimony and proceedings. See United States v. North, 910 F.2d at 872-73.

In this case, the government cannot satisfy North because it took no steps at all to insulate Mr. Conrad from either the proceedings in this case or the proceedings in Los Angeles. Mr. Conrad was briefed by Assistant U.S. Attorney O'Brien on Ms. Hsia's grand jury appearance and on Mr. O'Brien's belief that she had feigned difficulty with the English language to avoid answering his questions, at the very same time that Mr. Conrad was supervising Mr. McEnany and Mr. Yaffe with respect to sentencing in this case. There was no effort made to inject a different supervisor into one or the other of these two proceedings or to remove Mr. Conrad from any involvement in the development of legal arguments in connection with the sentencing in this case after he learned the details of Ms. Hsia's grand jury appearance and was discussing possible remedies, including possibly contempt, with Mr. O'Brien. While Mr. O'Brien and Mr. Conrad agreed that Mr. O'Brien would not speak with Mr. McEnany or Mr. Yaffe about the substance of Ms. Hsia's grand jury testimony, no formal measures were put in place to ensure that Ms. Hsia's immunized testimony was kept separate from the government's sentencing process, particularly with respect to Mr. Conrad's involvement in both. See Report and Recommendation at 3-4. There is no evidence in the record that establishes an independent basis for Mr. Conrad's non-evidentiary use of Ms. Hsia's compelled grand jury testimony or information derived therefrom, and all of the "circumstantial evidence suggests the precise contrary."

Id. at 11-12 (summarizing evidence). The Court must conclude that the government has failed to carry its heavy burden of proving independent source.

The government next argues that even if there were a violation of Kastigar, legal reasoning or argument can never be suppressed; and it rightly points out that neither the defendant nor the magistrate judge has cited any case that directly supports such suppression. The government then cites a number of cases that suggest by analogy that such non-evidentiary use is not prohibited by Kastigar and points out that the D.C. Circuit in North never reached the issue. See United States v. North, 910 F.2d at 856 (court "assum[ed] without deciding" that government cannot make non-evidentiary use of immunized testimony). While the question is a difficult one on which the government might well prevail in other circuits, the reasoning of the D.C. Circuit and the requirements it imposed in North represent the most rigorous application of the core principle of Kastigar, that the federal immunity statute withstands constitutional scrutiny only because it provides "a sweeping proscription of *any use*, direct or indirect, of the compelled testimony and any information derived therefrom." Kastigar v. United States, 406 U.S. at 460 (emphasis added). See United States v. North, 920 F.2d 940, 948 (D.C. Cir. 1990).

In discussing the split in the circuits on the issue of non-evidentiary use in North, the court clearly rejected the analysis of the cases on which the government primarily relies here and embraced those cases whose reasoning suggests (although none has directly decided) that Magistrate Judge Facciola's analysis is the correct one. See United States v. North, 910 F.2d at 857-60. As the magistrate judge said, "Kastigar prohibits the use of immunized testimony in the broadest possible terms. There is nothing in that decision or its progeny that permits an artificial distinction between non-

evidentiary and evidentiary use that could relieve a court of Kastigar's unequivocal command." Report and Recommendation at 14 (citation omitted). Kastigar bars the use of compelled testimony to pursue investigatory leads, to focus the investigation on the witness who was compelled to testify, and the like. Kastigar v. United States, 406 U.S. at 460. It bars the use of compelled testimony to refresh a witness's recollection, to plan trial strategy, to decide whether to plea bargain, to shape opening statements and closing arguments, or for other strategic purposes. See United States v. North, 910 F.2d at 857-58, 862-63. Kastigar even bars the testimony of a trial witness whose decision to testify "was *motivated by*, and therefore indirectly derived from," immunized statements. United States v. North, 920 F.2d at 942 (quoting United States v. Rinaldi, 808 F.2d 1579, 1584 n.7 (D.C. Cir. 1987) (emphasis added by D.C. Circuit)).

The Court sees no distinction between these uses and the development of sentencing arguments and strategy. Because not just testimony but any "information" obtained or derived, "directly or indirectly," from immunized grand jury testimony may not be used in any way in a criminal case, United States v. North, 910 F.2d at 857, the non-evidentiary use proposed by the government in this case cannot be permitted. Id. at 858 (compelled testimony cannot be used "in *any* respect" (quoting Kastigar v. United States, 406 U.S. at 460 (emphasis in original)). In view of the government's "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony," Kastigar v. United States, 406 U.S. at 460, the Court will suppress all reliance by the government at sentencing, both written and oral, on the Application Note 11 argument and will not consider it in connection with sentencing in this case.

The defendant argues that if the Court suppresses the Application Note 11 argument it necessarily must suppress every other argument made by the government in support of its sentencing recommendations. She maintains that once Mr. Conrad spoke with Mr. O'Brien about Ms. Hsia's grand jury appearance he was tainted; and to the extent that he participated at all in developing the government's sentencing position through his suggestions to or conversations with Mr. McEnany and Mr. Yaffe, all arguments presented by any of them constitute non-evidentiary use of Ms. Hsia's immunized testimony. That conclusion does not follow from the facts as found by Magistrate Judge Facciola and as modified by this Court, however, because the evidence presented demonstrates "that the government would have made all the other sentencing arguments whether or not Conrad had or had not supervised the preparation of the letter to Probation of November 8, 2000." Report and Recommendation at 13. On this issue the government has met its burden.

This Court's review of the transcript of the hearing before the magistrate judge makes clear that Mr. Conrad's substantive input was limited to the "dollar for dollar" Application Note 11 argument only, that Mr. Conrad did not write, edit or add to the government's letter to the Probation Office or its Sentencing Memorandum, and that Mr. McEnany would have taken the very same positions in sentencing except for the Application Note 11 argument even if he had never spoken to Mr. Conrad. See Report and Recommendation at 6-8; *supra* at 5-6. The magistrate judge therefore limited the remedy for the Kastigar violation he found to the suppression of the Application Note 11 argument because he was convinced "that the government would have made the other arguments whether Hsia testified [before the grand jury] or not. To grant Hsia any greater remedy would be to improve her sentencing position merely because she testified in the grand jury," a remedy to which she is not entitled under the use immunity statute or under Kastigar. Report and Recommendation at 13.

Having reviewed the evidence *de novo* and announced its own additional and modified Findings of Fact, this Court reaches the same conclusion. Kastigar requires suppression of the Application Note 11 argument only, nothing more. For all of these reasons, it is hereby

ORDERED that the magistrate judge's Report and Recommendation, as modified in Part I of this Opinion, is ACCEPTED; and it is

FURTHER ORDERED that the government is precluded from making any argument at sentencing regarding an upward departure pursuant to Application Note 11 to Section 2F1.1 of the United States Sentencing Guidelines.

SO ORDERED.

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PAUL L. FRIEDMAN
United States District Judge

DATE: